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NO. 85-5386

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

SON H. FLEMING,

Petitioner,

v.

RALPH KEMP, WARDEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

I.

Did the Eleventh Circuit Court of Appeals properly conclude that the Petitioner was represented by counsel at a pre-trial hearing?

II.

Did the Eleventh Circuit Court of Appeals properly conclude that Petitioner received effective assistance of counsel in accordance with the standards set forth by this Court?

III.

Did the Eleventh Circuit Court of Appeals properly conclude that there was no violation of Enmund v. Florida, 458 U.S. 782 (1982)?

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PART ONE

STATEMENT OF THE CASE

On September 13, 1976, Petitioner and his co-defendants, Larry Donnell Fleming and Henry Willis, III, were indicted by the Lanier County, Georgia grand jury for the malice murder of James Edward Giddens, said crime occurring on February 11, 1976. Petitioner was originally tried in the Superior Court of Lanier County, Georgia beginning on January 24, 1977 and was convicted of murder and received the death penalty. On direct appeal, the Supreme Court of Georgia reversed the Petitioner's death sentence due to the sentencing phase instructions, but affirmed the conviction. Fleming v. State, 240 Ga. 142, 240 S.E.2d 828 (1977).

On remand, Petitioner's trial was moved to the Superior Court of Cook County following the granting of a motion for a change of venue. The resentencing trial occurred on December 5-6, 1977. The jury again found statutory aggravating

circumstances and imposed the death penalty. On direct appeal, the Supreme Court of Georgia affirmed the death sentence and this Court denied a petition for a writ of certiorari. Fleming v. State, 243 Ga. 120, 252 S.E.2d 609 (1979), cert. denied, 444 U.S. 885 (1979).

Petitioner subsequently filed an application for habeas corpus relief in the Superior Court of Tattnall County, Georgia. A hearing was held on the application on March 27, 1980. The state habeas court denied relief on July 1, 1980. The Supreme Court of Georgia denied the application for a certificate of probable cause to appeal on October 21, 1980 and denied the motion for reconsideration on November 14, 1980. Petitioner filed a petition for a writ of certiorari which was denied by this Court as was the petition for rehearing. Fleming v. Austin, 452 U.S. 910, rhng. denied, 453 U.S. 928 (1981).

Petitioner next filed a petition for habeas corpus relief in the United States District Court for the Middle District of Georgia on October 5, 1981. The case was assigned to a Magistrate who held a hearing on December 6, 1982. Proposed findings of fact and conclusions of law were entered on December 29, 1982 recommending that the conviction and sentence be set aside based on the alleged denial of effective assistance of counsel at a committal hearing. Subsequently, the district judge held evidentiary hearings on February 11, 1983 and March 4, 1983. After conducting these hearings, the district court entered an order denying habeas corpus relief on March 25, 1983. Fleming v. Zant, 560 F.Supp. 525 (M.D.Ga. 1983).

Petitioner then filed an appeal in the Eleventh Circuit Court of Appeals. On November 29, 1984, that court issued an opinion affirming the district court's denial of habeas corpus relief. Fleming v. Kemp, 748 F.2d 1435 (1984). A subsequent petition for rehearing en banc was denied by the court on June 14, 1985.

PART TWO

STATEMENT OF FACTS

On February 11, 1976, Farrell Kent, the owner of a grocery store in Cook County, Georgia, was robbed by two men at approximately 10:00 or 10:30 p.m. Mr. Kent identified Larry Fleming and Henry Willis as the two men who robbed him. Money taken during the robbery was stuffed into a paper sack. The robbers also took a carton of cigarettes. The victim was later able to identify one of the bills recovered from the automobile the Petitioner was driving at the time of his arrest as a bill which was taken during the robbery.

L. V. Dupree was talking with Police Chief James E. Giddens in Ray City, Georgia, on the same day, when he heard a police report on Giddens' radio about an armed robbery occurring in Adel, Georgia. Shortly thereafter, a two-tone automobile containing two visible black male passengers drove by. Giddens told Dupree that he was going to check on the car and would be right back. Giddens then pursued the automobile.

Officer Sizemore, a dispatcher at the police station, received a call from Chief Giddens reporting that he was stopping a red and white Ford with tag number GBO 282. This was the last radio communication received from Giddens. When Giddens did not return to Dupree's location, Dupree drove down the road and found Giddens' police car less than a mile away. There were no passengers in the car and the lights and motor had been turned off. Dupree utilized the radio in the vehicle and reported his finding.

Several law enforcement officers and other individuals joined in the lookout for the Ford. Mike Daily spotted an automobile fitting the description. They saw the automobile drive by and, like Mr. Dupree, initially only saw two people in the car. After they followed the car for a short distance, they saw a third head suddenly appear in the passenger compartment. Daily and his friends called to report his

findings and the Petitioner's car was stopped in Brooks County by two Sheriff's deputies at about 12:30 a.m. The deputies stopped the car and forced the three occupants to emerge. They searched the automobile after receiving Petitioner's consent. The Petitioner was driving the automobile. The officers found a .357 magnum revolver, a .22 caliber revolver and a brown sack containing money. It was later discovered that the .357 magnum had belonged to Chief Giddens. They also found a carton of cigarettes and wet clothing in the trunk.

Several hours later, a shirt from Chief Giddens uniform was found in Lanier County near Lakeland, Georgia, near the roadway. The body of the victim was found at a nearby swamp approximately 100 feet from the roadway.

An autopsy showed that Chief Giddens had been shot several times. There were five gunshot wounds to the head in addition to wounds in the stomach and arm. There were also rat shot wounds to the right temple. There were powder burns on the victim indicating that the weapon which fired the shots to the head had been fired at a distance of 18 inches or less. Ballistics tests also revealed that the bullet recovered from the victim's arm had been fired from his own weapon.

After being arrested, Petitioner initially told the authorities that he was not with Larry Fleming or Henry Willis during the armed robbery or murder and knew nothing of the shooting. Petitioner claimed that he had been with other individuals on the night of the shooting. The authorities determined that the parties the Petitioner claimed to be with denied having been in his presence on the night of the killing.

Later, while incarcerated in the Cook County jail, the Petitioner made statements to another inmate. This inmate testified that the Petitioner admitted to him that he drove the car to the parking lot of the grocery store for the robbery and parked in the shadows so no one could identify him. The Petitioner told the inmate about a struggle with the police

officer in which he and the other two men took away the police officer's gun. Petitioner told the inmate that he took the weapon and shot Officer Giddens as he tried to escape. G.B.I. Agent Greeson interviewed the Petitioner on February 12, 1976. In this statement, the Petitioner again denied his involvement in the robbery or shooting, although acknowledged that he had been in the company of Larry Fleming and Henry Willis at approximately 10:30 p.m. on the night in question.

Petitioner was also interviewed on February 16, 1976. In this statement, the Petitioner admitted being with Larry Fleming and Henry Willis when Chief Giddens stopped their automobile. Petitioner admitted driving and showing his driver's license to Chief Giddens. According to the Petitioner's statement, when Chief Giddens found some money under the seat, Willis and Larry Fleming grabbed Giddens. Petitioner stated that he was forced to drive the automobile while Larry Fleming and Willis held guns on Giddens. Petitioner stated that Chief Giddens begged to be released. Petitioner stated that when Giddens was let out of the automoible, Giddens started running and Larry Fleming shot him four times. According to the Petitioner, Willis and Larry Fleming followed Giddens into a pond and shot again.

Colquitt County Sheriff Alderman also spoke to the Petitioner on the same day. Petitioner told Alderman that he begged the other two not to kill Chief Giddens and that Giddens begged the men not to kill him.

Petitioner's sole defense presented at trial was his own testimony. He admitted borrowing the car and traveling to Valdosta with Larry Fleming and Henry Willis. He testified that Larry Fleming and Willis took the car and did not return until 11:00 or 11:30 p.m.

Petitioner was found guilty of the malice murder of Chief Giddens at his first trial. At both trials, the jury found the existence of two statutory aggravating circumstances, that being, that the murder was committed during the course of

another capital felony, to wit: kidnapping with bodily injury, and that the murder was committed against a peace officer while he was engaged in the performance of his official duties.

Additional facts will be developed as necessary in the following portions of the brief.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY CONCLUDED THAT PETITIONER WAS NOT DENIED COUNSEL AT ANY PRE-TRIAL PROCEEDINGS.

Petitioner's first three issues presented to this Court concern an allegation of denial of counsel at a pre-trial hearing. The issue is whether Petitioner was represented by counsel and what type of proceeding actually occurred. Respondent submits that, as the Eleventh Circuit properly resolved this issue under federal constitutional law and properly applied a clearly erroneous standard to the findings by the district court, no constitutional issue exists for review by this Court.

According to the facts found by the district court, the Petitioner and his two co-defendants were brought before Superior Court Judge Lott in Berrien County on Monday, February 16th at 5:30 p.m. Each defendant was advised of his right to an attorney and the Petitioner said his mother was going to get him an attorney. The next day the grand jury of Berrien County indicted all three for kidnapping with bodily injury. The grand juries of Cook and Lanier Counties had already disbanded and were not in the position to consider indictments for armed robbery and murder, which offenses occurred in those two counties. Thus, the three were held on the kidnapping indictments.

On February 24th at 3:15 p.m., the three again appeared before Judge Lott in Berrien County. The Petitioner asked for an appointed attorney to serve until he could employ his own attorney. The court appointed Edward Parrish to represent the Petitioner. On April 30th, 1976, each defendant appeared before the Superior Court of Berrien County with appointed

counsel and was arraigned on the kidnapping with bodily injury charge.

The district court found the following with regard to attorney Millard Farmer's participation in the cases:

> Millard Farmer, an experienced Atlanta criminal defense lawyer then engaged 100% of the time as an employee of the Georgia Criminal Justice Council in defending indigent criminal defendants, was contacted by M. Dale English, Larry Fleming's appointed lawyer in the Berrien County kidnapping indictment charges, and asked to represent Larry Fleming. Mr. Farmer traveled to South Georgia, talked to Larry Fleming and agreed to represent him. He also was asked by Larry Fleming to represent Henry Willis and he agreed to do so. (Farmer's testimony, p. 32). Mr. Farmer was not appointed by the judge of the Superior Court to represent either Larry Fleming or Henry Willis.
>
> Without contacting the lawyer appointed to defend petitioner Son Fleming in the Berrien County kidnapping with bodily injury indictment, Millard Farmer advised District Attorney Vickers Nugent (sic) that he would be representing Larry Fleming and Henry Willis on all charges - indicted and unindicted - and requested a so-called committal hearing for them. Messrs. Farmer and Nugent (sic) then agreed to hold a hearing before a justice of the peace in Cook County, at which evidence as to all three charges -- already indicted kidnapping

> with bodily injury and yet-to-be indicted armed robbery and murder -- would be presented. Mr. Nugent (sic) notified petitioner's court-appointed counsel that the hearing would be held.

Fleming v. Zant, 560 F.Supp. at 529-30.

The district court went on to consider Mr. Parrish's participation in this proceeding. Mr. Parrish did not believe that committal hearings were beneficial and routinely did not request them or participate in them when they were requested by counsel for co-defendants. He went to the hearing to observe the proceedings, but "already knew almost as much about the case as the district attorney knew, and was in position to interview all witnesses without the compulsion of a court hearing. . . . The agreed upon hearing was designed to make it unnecessary for Mr. Farmer to have to personally investigate the whole case." Id. The hearing was held in Cook County, Georgia before Justice of the Peace Dan Cowart.

The district court noted that the transcript reflected Mr. Farmer appearing "for the defendants." The court also noted that the hearing was specifically held by agreement and stipulation by "counsel for the defendants, Millard Farmer." Id. The parties reportedly noted that the hearing was intended to be a committal hearing on the armed robbery and murder charges and a discovery hearing on the kidnapping charges. The district court found that Mr. Farmer never intimated that he was only representing two of the defendants and that Mr. Farmer thoroughly questioned all witnesses in regard to all three of the defendants.

Subsequent to this proceeding, the Petitioner was indicted in Lanier County on charges of murder. No probable cause determination was made pursuant to this hearing. Edward Parrish was subsequently appointed specifically to represent the Petitioner on the murder charge and Petitioner's mother engaged Benjamin Zeesman also to represent the Petitioner.

The district court specifically found as fact that Edward Parrish was notified of the so-called "committal" hearing and decided as a matter of trial strategy not to participate in the proceeding along with Mr. Farmer. Id. at 532. The court noted that Petitioner's mere presence at the proceeding was consistent with his counsel's trial strategy.

The district court went on to conclude that the hearing was not, in reality, a committal hearing. The court found that the Petitioner had been held from February 17, 1976 until the date of the hearing on a kidnapping indictment. As noted by the court, under Georgia law once the indictment had been returned, Petitioner was not entitled to a hearing to inquire into the question of whether or not the State had evidence on those crimes or crimes for which he had not been indicted in order to hold the Petitioner. "The fact that the prosecuting attorney and Mr. Farmer agreed and stipulated to hold a hearing and called a portion of it a committal hearing does not alter its true nature and purpose -- an agreed upon discovery conference -- or convert it into something not authorized or contemplated by law." Id. at 533.

The district court went on to find that Mr. Farmer elected to represent the Petitioner at the hearing and did represent the Petitioner at the hearing. This factual finding is based on numerous facts set forth by the district court in its opinion. Id. Thus, the district court specifically concluded that the Petitioner was represented at this proceeding and that the proceeding was not a committal hearing as contemplated by law.

On appeal, the Eleventh Circuit did not specifically decide whether or not the proceeding was a committal hearing. The Eleventh Circuit applied a clearly erroneous standard to the specific factual findings made by the district court. These factual findings being that Mr. Farmer actually did elect to represent the Petitioner and did act on Petitioner's behalf at the committal hearing. Contrary to the assertion of the

Petitioner, this is a factual finding entitled to the clearly erroneous standard of review. The court also specifically found that the finding by the district court was well documented and fully supported by the record. Thus, the court accepted the finding that Petitioner was represented by counsel.

Although the court did not specifically find that the proceeding was not a committal hearing, the findings by the court at least intimate it might have concurred with the findings by the district court. The court noted that the State responded that the hearing was not a committal hearing but an informal discovery session, even though it was presided over by a judicial officer. "This is apparent from the fact that the presiding judicial officer made no probable cause determinations at the conclusion of the proceeding." Fleming v. Kemp, 748 F.2d at 1443. The Eleventh Circuit went on to note that the record strongly supported the position of the Respondent that the hearing was not a committal hearing, finding the following:

> First, the Cook County Justice of the Peace had subject matter jurisdiction only over the crime committed in Cook County, armed robbery; he did not have jurisdiction over the malice murder offense now under review, because that offense took place in Lanier County, Ga.Code Ann. § 15-10-50(b) (1982), or the kidnapping with bodily injury offense, because that offense occurred in Berrien County, id., and the grand jury had already returned an indictment thereon. . . . Second, the justice of the peace neither entertained argument nor entered an order on the issues posed by a committal hearing. Third, defense counsel viewed the hearing as merely a discovery

> session; as attorney Farmer told the district court at the habeas hearing, he requested the hearing to discover the State's case.

Fleming v. Kemp, supra, 748 F.2d at 1443 n.27. Thus, the record clearly supports the district court's finding that the proceeding was not a committal hearing at all, but simply a discovery conference conducted in a more formal nature than usual. The main factor supporting this finding is the finding that the justice of the peace neither had the authority to address the question of the murder offense now under consideration nor did he ever enter any type of order as to probable cause as a result of this proceeding.

Respondent submits that the district court's findings are clearly questions of fact which are entitled to the clearly erroneous standard. The cases cited by the Petitioner are not applicable to the circumstances of the instant case. The question of whether counsel's specific actions are effective is a mixed question of fact and law, but what counsel actually did is not. In this case, whether or not counsel actually represented the Petitioner or Petitioner was represented by counsel is clearly a question of fact properly resolved by the district court. Even though this may resolve the ultimate question posed to this Court, this does not mean it is not entitled to the clearly erroneous standard, unlike cases involving questions of effectiveness or conflicts of interest. See Cuyler v. Sullivan, 446 U.S. 335 (1980). Whether or not Petitioner was represented by counsel is clearly an elemental fact which is entitled to a clearly erroneous standard of review.

Based upon all of the above, it is clear that no constitutional issue is presented for review by this Court. Both findings by the district court are correct. The Petitioner was represented at the pre-trial proceeding and the

pre-trial proceeding was not a committal hearing so it was not a "critical stage" requiring counsel. As the proceeding was not a committal hearing as contemplated by this Court in cases such as Coleman v. Alabama, 399 U.S. 1 (1970), the failure to have counsel would not serve as a constitutional violation.

Furthermore, Respondent takes issue with Petitioner's contention that such requires an automatic reversal even if there were a constitutional violation. Holloway v. Arkansas, 435 U.S. 475 (1978) involved the question of an actual conflict of interest and this Court was simply not addressing the circumstances present in the instant case. This Court did not overrule the suggestion in Coleman v. Alabama, supra, that harmless error could perhaps be found under certain circumstances. As the district court specifically found no prejudice in this regard, clearly any error would be harmless beyond a reasonable doubt.

Respondent therefore submits that this Court should decline to grant certiorari as the findings by the district court are not clearly erroneous and no constitutional violation exists for review by this Court.

II. THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY CONCLUDED THAT PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner asserts that the Eleventh Circuit Court of Appeals improperly found that he received effective assistance of counsel at both phases of his trial. Petitioner lists some specific allegations of ineffective assistance and then makes a conclusory statement that counsel was ineffective and that there are other allegations which he cannot set forth due to the page limitation. Respondent asserts that the Eleventh Circuit Court of Appeals properly addressed all allegations concerning the claim of ineffective assistance of counsel and properly found counsel to be effective under the standards set forth by this Court in Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052 (1984). As the court followed the standards set forth by this Court, no constitutional issue is presented for review.

In particular, Petitioner raises a challenge that counsel failed to request a change of venue for Petitioner's initial trial. In regard to this allegation, the Eleventh Circuit Court of Appeals found the following:

> Petitioner contends that his lawyers erred in failing to request a change of venue from Lanier County, where Chief Giddens' murder tdok place, because of pre-trial publicity and the attitude of the community. Chief Giddens had neither lived nor worked in Lanier County and was not widely known there. As the state habeas court observed, only ten percent of the jurors were excused because of pretrial publicity or bias toward the accused. The prosecutor, testifying in the district court, said that

> there was very little pretrial publicity in Lanier County and that the spectators at trial were well behaved. Parrish felt that Lanier County would be a good location for the trial and that his considerable experience trying cases there, many as prosecutor, enabled him to choose a "favorable" jury. Moreover, the trial judge had a reputation for fairness. We agree with the district court that, under these circumstances, Petitioner's attorneys exercised reasonable professional judgment in deciding not to pursue a change of venue.

Fleming v. Kemp, supra, 748 F.2d at 1447.

Clearly, this amounted to a tactical decision by counsel and was a reasonable one under the circumstances. Therefore, Petitioner has failed to make the showing required in Strickland v. Washington, supra, "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id., 104 S.Ct. at 2064. Further, Petitioner has failed to show actual prejudice from the failure to move for a change of venue in that Petitioner has failed to show that one would have been warranted under the circumstances of the case. Thus, the Eleventh Circuit properly concluded that counsel was not ineffective for failing to move for a change of venue.

Petitioner also complains that counsel failed to attend the so-called "committal" hearing. As has been noted previously, Respondent asserts that the hearing prior to trial was not a committal hearing but a discovery conference requested by Millard Farmer.

In relation to the pre-trial hearing, the Eleventh Circuit Court of Appeals found the following:

> Petitioner contends that Edward Parrish was derelict in his duty for failing to attend the May 14, 1976 discovery hearing before the Cook County Justice of the Peace. Parrish knew about the hearing and attended briefly. He did not stay for the entire proceeding because he already knew what the State's evidence was; petitioner was not going to testify, and Parrish felt that it was in petitioner's best interest not to stay. No portion of the transcript of the May 14 hearing was introduced into evidence at petitioner's trial, either as substantive evidence or for impeachment purposes. Petitioner makes no claim that the hearing, or anything that transpired as a result thereof, prejudiced him in any way at his trial. He thus fails to establish the prejudice element essential to relief under Washington.

Fleming v. Kemp, supra, 748 F.2d at 1447. It is clear that this finding of the Eleventh Circuit Court of Appeals is proper under the holding of this Court in Strickland v. Washington, supra, and Petitioner has failed to show any prejudice from the actions of counsel. Therefore, no constitutional violation is presented by this allegation.

Petitioner finally asserts in relation to the guilt-innocence phase that counsel failed to object to the belated witness list. In the Eleventh Circuit, Petitioner had complained that counsel failed to request a continuance of the trial "when, at his arraignment, the prosecutor did not produce a list of the witnesses who would testify in the State's case in chief, as required by Georgia law." Fleming v. Kemp at 1447. The prosecutor continued to supplement a tentative list

he had given the defense and produced a final list about a week before trial. The Eleventh Circuit found that there were no surprises and that Petitioner's attorneys had fully anticipated who the witnesses would be and they were prepared to confront these witnesses. Petitioner has failed to show that he was prejudiced in any manner by the way in which the State produced the witness list and did not even contend that he was prejudiced by this "piecemeal" production of the witness list. Therefore, there was clearly no Sixth Amendment violation by the attorneys' failure to move for a continuance.

In relation to the second sentencing trial, Petitioner asserts that counsel failed to move for a "meaningful" change of venue. Counsel did move for a change of venue in relation to the resentencing trial and agreed to a change of venue to Cook County, Georgia, approximately ten miles away from the original sentencing proceeding. The Eleventh Circuit found that attorney Parrish was familiar with community attitudes in Cook County and had a successful practice in the county seat of Cook County. He felt comfortable in choosing a jury there. Under the holding of this Court in Strickland v. Washington, supra, there is a strong presumption that counsel's conduct falls within the range of reasonable professional assistance. Under the circumstances presented when defense counsel was familiar with the area and knew the persons in the county, Petitioner has failed to overcome the presumption in favor of the competency of counsel and has also failed to show there was any prejudice in regard to this allegation.

Finally, Petitioner asserts that counsel failed to properly investigate and present mitigating evidence at his second sentencing trial. Both the district court and the Eleventh Circuit Court of Appeals addressed this allegation in detail. Attorney Zeesman was primarily responsible for investigating alibi and character witnesses. Unfortunately, Mr. Zeesman had been ill and could not remember any details of his investigation; however, he did recall contacting potential

witnesses who were antagonistic toward the Petitioner. He found nothing favorable in the rest of his investigation. Certain witnesses he talked to had credibility problems and would not have made good witnesses. He cross-examined Sheriff Alderman to try to bring forth favorable character evidence. Affidavits were presented from seven potential character witnesses at the habeas corpus hearing. The Respondent presented affidavits from other persons showing that the Petitioner had a bad character, was a fighter and a drunk and had an explosive temper. In considering all of this evidence, it is clear the district court properly concluded that the attorneys adequately prepared for the penalty phase of the trial and rendered competent assistance in light of the totality of the evidence available to them. Furthermore, Petitioner has failed to show there was any prejudice by counsel's actions.

A consideration of counsel's conduct as a whole clearly shows that counsel's conduct fell within the range of reasonable professional assistance as required by Strickland v. Washington, supra and that Petitioner has failed to show any prejudice by any actions or inactions on the part of his trial attorneys. Thus, this allegation fails to set forth any ground for relief in this Court.

III. THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY CONCLUDED THAT THERE WAS NO VIOLATION OF ENMUND V. FLORIDA, 458 U.S. 782 (1982).

Petitioner asserts that the instant jury decision violates the principle set forth by this Court in Enmund v. Florida, supra. Petitioner also asserts that this Court should grant certiorari in this case in light of the alleged conflict of decisions between the Eleventh Circuit Court of Appeals and the Fifth Circuit Court of Appeals in relation to whether there is a requirement of a specific jury finding of intent to kill before a death sentence can be imposed. See Bullock v. Lucas, 743 F.2d 224 (5th Cir. 1984), cert. granted, Cabana v. Bullock, ___ U.S. ___, 105 S.Ct. 2110 (1985); Ross v. Kemp, 756 F.2d 1483 (11th Cir. 1985) (en banc). Respondent submits that the instant case is sufficiently distinguishable from Enmund v. Florida, supra, as to make that decision inapplicable to the facts of the instant case. Furthermore, Respondent submits that there is no constitutional requirement set forth by this Court for a specific jury finding of intent.

The Eleventh Circuit Court of Appeals examined this issue and noted that the Petitioner was indicted solely for malice murder. The jury was charged to that effect and returned a verdict of guilty as charged, thereby finding the Petitioner guilty of malice murder. Although a portion of the jury charge did refer to felony murder, it is clear from considering the totality of the charge that the jury realized the Petitioner was indicted only for malice murder and from the jury's finding it is clear the jury found malice murder. The Eleventh Circuit found that the reference to felony murder was mere harmless surplusage. Fleming v. Kemp, supra, 748 F.2d at 1454.

The trial court also charged in regard to conspiracy. Under the charge given by the trial court, it is implicit that the murder itself must be the "common purpose" of the

conspiracy. Thus, it is clear that even under the conspiracy charge, the requisite intent must have existed before the Petitioner could have been found guilty. In regard to parties to a crime, the court specifically informed the jury that a person was concerned with the commission of a crime only if he directly committed the crime, intentionally caused someone to commit the crime, intentionally aided or abetted in the commission of the crime or intentionally advised or hired someone else to commit the crime. Thus, intent was an essential element that the jury had to find in order to find the Petitioner guilty, either intent to commit the crime itself or intent to have it committed. Thus, this clearly complies with the requirements of Enmund, supra. Under the charge given to the jury in the instant case, there was no requirement for any specific finding of intent to kill as such was implied by the verdict of the jury.

Furthermore, the evidence clearly shows that the Petitioner was a culpable party in the crime. By finding the Petitioner guilty of murder, the jury necessarily rejected any theory which would show that he was an innocent person or that he was forced into the situation. Therefore, the Eleventh Circuit properly found the following:

> We draw three conclusions in analyzing petitioner's Edmund (sic) claim. First, the indictment charged petitioner with malice murder only, and the court instructed the jury that it had to find all of the elements of malice murder, including intent to kill, to convict him. Second, the parties, in their closing arguments, did not treat the prosecution as one for felony or conspiratorial murder. Third, the jury's verdict could not have been based on felony

or conspiratorial murder to the exclusion of malice murder.

Fleming v. Kemp, supra, 748 F.2d at 1455-6. Therefore, Respondent submits that this case is distinguishable, not only from Ennund v. Florida, supra, but from those cases cited by the Petitioner from both the Eleventh Circuit Court of Appeals and the Fifth Circuit Court of Appeals in which Petitioner asserts there is a conflict of decisions. Therefore, no reason exists for the granting of certiorari to consider this issue.

CONCLUSION

For all of the above and foregoing reasons, the petition for a writ of certiorari filed on behalf of Son H. Fleming should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, MARY BETH WESTMORELAND, a member of the Bar of the Supreme Court of the United States, and counsel of record for the Respondent, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this date served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing copies of same in the United States mail with proper address and adequate postage to:

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This 10th day of October, 1985.

Mary Beth Westmoreland
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